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No. 21

Supreme Court of the United States

OCTOBER TERM, 1945

THOMAS MARTINO,
PETITIONER,

v.

MICHIGAN WINDOW CLEANING COMPANY,
RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITIONERS' REPLY BRIEF

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Petitioners Would Be Within the Act If Employed Directly By the Factories Whose Windows They wash

The purposes of the Fair Labor Standards Act cannot be evaded by the device of contracting out to a separate corporation work which otherwise would be under the terms of the Act. Clearly, General Motors Corporation would be within the Act if it had employed these window washers directly, and the accomplishing of the same result by employing the respondent, Michigan Window Cleaning Company, does not deprive the window washers of the protection of the law. To construe the statute otherwise would make possible the destruction of its purpose, for if this were permitted as to an independent contractor it

might be employed to remove more and more employees from the protection of the Act through the use of subordinate corporations.

Kirschbaum v. Walling, 316 U. S. 517, 524, states that ". . . the provisions of the Act expressly make its application dependent upon the character of the employees' activities," and establishes that maintenance employees may be engaged in occupations necessary to the production of goods for commerce within the meaning of the Act even though not employed by the manufacturer of goods. If the window washers in the instant case were employed by respondent's customers to perform the same kind of work which they now do as employees of respondent, there is no question they would be held to be engaged in occupations necessary to the production of goods. As is more fully developed in Petitioners' Brief (pp. 22-31), and emphasized below in this Reply Brief, the work of window washing, by whomsoever performed, is so closely related to the physical process of production that to differentiate between employees of the factory itself and employees furnished by an independent contractor "is to make too much turn on the accident of the division of the whole industrial process." (See 10 *East 40th Street Building v. Callus*, 65 S. Ct. 1227.)

Petitioners Are Engaged In An Occupation "Necessary to the Production" of Goods for Commerce and Do Not Come Within the Exemption Provided by Section 13(a) (2)

The Respondent admits that the question of the "necessity of window washing" to the production of goods for commerce or to commerce itself, is not an issue in this case. Respondent states the only question to be "whether or not the greater portion of respondent's servicing was interstate or intrastate" (Respondent's Brief, p. 24),

and to bolster this contention, the respondent quotes from Interpretative Bulletin No. 6, dated December 1938, and makes the argument that the criterion used in Section 13 (a) (2) is based upon the nature of the business conducted by the employes. On page 9 of its Brief, the respondent states that "with the foregoing citation in mind, it is plain to see that Petitioner is proceeding upon an erroneous theory which is not supported by law or the Interpretative Bulletin." The fallacy of the last statement of the respondent arises from the fact that since 1941, the original Interpretative Bulletin, which was issued soon after the Wage and Hour Law became effective, has been changed in the light of more mature considerations and decisions of the courts, so that Section 5 of the same Interpretative Bulletin No. 6 now reads:

> "It should be noted that the test prescribed in Sections 6 and 7 is related to the nature of employment of the particular employee. The criterion used in section 13 (a) (2), on the other hand, is based upon the nature of the establishment in which the employee is engaged. Thus, under sections 6 and 7, some employees of a given employer may be covered and others may not be covered. If, however, the exemption provided by section 13 (a) (2) is applicable because the greater part of the selling or servicing by the retail or service establishment is in intrastate commerce, all employees engaged in the establishment are exempted from sections 6 and 7."

This Court pointed out in *Phillips v. Walling*, 323 U. S. ....., that "* * * the word 'establishment' [means] a distinct, physical place of business." Accordingly it follows that even if it is assumed for the purposes of argument that respondent is a service establishment, the greater part of whose servicing is in intrastate commerce, the exemption would in this case not be applicable for the further reason that respondent's employees are not engaged *in* respondent's establishment. It is not enough that the em-

ployee be engaged *by* a service establishment—he must be engaged *in* a service establishment.

Numerous cases have held the exemption provided by Section 13 (a) (2) inapplicable to establishments operated substantially for industrial customers. See *Bracey v. Luray*, 138 F. (2d) 8; *Guess v. Montague*, 140 F. (2d) 500; *Walling v. Consumers Co.*, 8 Wage Hour Rept. 350. In *Schmidt v. Peoples Telephone Union*, 138 F. (2d) 13, 15, the Eighth Circuit refused to apply the exemption to a local telephone company, which of course provides "service" in the literal sense, and held that "the term applies to an altogether different class of business, such as restaurants, hotels, laundries, garages, barber shops, beauty parlors, funeral homes, shoe-shining parlors, clothes pressing clubs, and the like."

It is particularly significant in the instant case that respondent in its Brief fails to refute the authorities cited in Petitioner's Brief (p. 22-27), all of which establish the close relationship of window washing to the production of goods. The authoritative sources on factory and production problems, such as the United States Department of Labor,[1] the National Society for the Prevention of Blindness,[2] and other authorities,[3] all place great emphasis upon the need of clean windows for efficiency and safety in production. It is submitted that the conclusion is inescapable that the window washers involved in this case are engaged in an occupation which is essential to the successful operation and maintenance of the manufacturing plants in which they work and is clearly necessary to the production of goods for commerce within the meaning of the Act. Clearly, the activities of the window washers in this case are indistinguishable from the work of the janitors and

[1] See Appendix I.
[2] See Appendix II.
[3] See Appendix III.

porters in the *Kirschbaum* case and in *Borden Co. v. Borella*, 65 S. Ct. 1223.

In its Brief, respondent states (p. 26) that, "Employees of respondent are not sent 'into' manufacturing plants in the sense employed by Petitioner. Employees of respondent wash windows. The windows are in the outside walls of buildings." It was stipulated, however, that the greater portion of the work done by the employees in this case was in washing windows located in factories which produced goods for interstate commerce. The respondent wants this Court to conclude that such a stipulation means that windows are on the "outside walls of buildings." We merely point out that those same walls have two sides, an "inside" and "outside," and that we need not conclude that window washers climb up on the outside of a building to wash windows, where the fact is that they go into plants and wash the inside as well as the outside of the windows.

Respondent's Brief cites many District Court opinions, none of which is relevant to the instant case. A lengthy analysis of each of these lower court citations is not warranted, since the decisions of this Court make it clear that the arguments advanced by respondent are without merit.[4]

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[4] An examination of some of the District Court cases cited by respondent discloses that they are not applicable.

Walling v. Fred Wolferman, Inc. (D.C. Mo. 1944), 54 F. Supp. 917, was erroneously decided. This Court's subsequent decision in *Phillips v. Walling, supra* (see p. 20 of Petitioners' Brief) completely repudiates the broad construction given by the *Wolferman* case to the word "establishment." A reading of the context of the Court's opinion in *Gavril v. Kraft Cheese Co.*, 42 F. Supp. 702, indicates that this decision supports petitioners' position, rather than that of respondent. In the *Gavril* case the employees were held to be engaged in commerce within the meaning of the Act and the exemption in Section 13 (a) (2) was rejected; but the complaint was dismissed because of the applicability of Section 13 (b) (1), a factor wholly foreign to the issues here. Respondent cites the decision of the District Court in *Walling v. Roland Electric Co.*, 54 F. Supp. 733, in support of its position, but fails to disclose the fact that this decision was reversed by the Fourth Circuit, 146 F (2d) 745, and is now pending on certiorari in this Court. *White v. Jacobs Pharmacy*, 47 F. Supp. 298, is also inconsistent with this Court's decision in the *Phillips* case and reveals a misapprehension of the scope of Section 13 (a) (2) into which the court was led because of its reliance on the 1938 edition of Interpretative Bulletin No. 6 which is discussed more fully above.

The Complaint Was Improperly Dismissed

The objection raised by respondent's Brief (p. 27), that Petitioners have introduced the question as to the propriety of the dismissal of the complaint for the first time in this Court is not supported by the record. The record makes it clear (R. 23, points 3 and 4) that the point was raised on October 29, 1943, when petitioners filed their "Statement of Points" in the Circuit Court of Appeals. As the record will also disclose, no motion to dismiss the complaint or motion for summary judgment of dismissal was ever filed by respondent and no proofs had been taken at the time the District Court dismissed the complaint *sua sponte*, after petitioners, at the District Court's direction, had renewed their motion for summary judgment. The language "in accordance with the instructions of the Court" which appears in the Renewal of Motion for Summary Judgment was inserted in the motion for the purpose of indicating that petitioners were acting at the Court's order.

Instead of it being "unfair for petitioners to be permitted to go off into realms of possibilities, conjectures, and suppositions," as respondent (p. 28) characterizes the discussion of the proof which could have been adduced, the Rules of Civil Procedure require that on a motion to dismiss the complaint, all allegations of fact in the complaint be taken as true, in the factual light most favorable to the plaintiff's position. *Mott v. City of Flora et al*, 3 Federal Rules Decisions 232; *Nye et al v. Mutual Benefit Life Ins. Co. et al*, 3 Federal Rules Decisions 308.

Petitioners Are Not Barred from Recovery Under the Act Because They Were Compensated According to the Terms of a Union Contract

The contention of the respondent that the petitioners are estopped because of a private trade union contract has been consistently and unanimously rejected by this Court. Private contracts made before or after the passage of the Wage and Hour Law regulating overtime cannot take the overtime transactions "from the reach of dominant constitutional power" and any contract falling short of the basic policy of the Act cannot be utilized to deprive employees of their statutory rights. See *Overnight Motor Co. v. Missel*, 316 U. S. 572; *Walling v. Youngerman-Reynolds Hardwood Co.*, 65 S. Ct. 1243; *Wilkenson vs. Noland*, 40 F. Supp. 1009.

CONCLUSION

It is therefore again submitted that the judgment below should be reversed and the cause remanded with instructions to enter judgment for the Petitioners.

Respectfully submitted,

LEON A. COUSENS,
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DANIEL D. CARMELL,
Of Counsel.

APPENDIX I

ILLUMINATION

By J. S. Rogers

Poor lighting harms eyes and may effect entire body—Uniform light distribution important—General illumination—Local illumination—Natural light—Recommended levels of illumination.

* * *

Work and safety depend upon seeing, but eyes are useless without light. * * * Estimates have been made by those interested in safety which indicate that poor illumination contributes to at least 25 percent of industrial accidents.

Not only is it a well-established fact that poor lighting adversely effects the eye itself, but recent investigations have confirmed a long suspected effect of unsatisfactory lighting conditions upon the general health of the human body. All organs of the body are integrated to form a human working machine, and imperfections in one organ often effect others. Thus, eye fatigue induced by the unnecessary strain resulting from poor lighting does effect the general health of those who are subjected to such a harmful environment.

Regardless of its source, whether it be daylight or artificial light, light obeys the same natural laws. Eyes require light of not less than certain minimum quality uniformly distributed over work areas. * * *

NATURAL ILLUMINATION

Natural illumination through windows and skylights is desirable because of its spectral quality, * * *.

Besides directly reducing accidents and improving production, good factory lighting aids in maintaining a clean and orderly plant. Dirt hidden in corners by shadows is

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Protecting Plant Manpower, Practical Points on Industrial Sanitation and Hygiene, Special Bulletin No. 3, United States Department of Labor, Division of Labor Standards, Government Printing Office, Washington, 1941, pages 63-66.

unnoticed. Scattered material and general unkeptness are not obvious under poor light. Because cleanliness and orderliness are considered by sound management definite factors in the efficient and economical operation of factories, it is important from the operating point of view that good lighting be provided. Cleanliness and orderliness mean good "housekeeping" [which is] an essential element in well organized safety programs.

APPENDIX II

EYE HAZARDS IN INDUSTRY *

By Louis Resnick

Natural lighting—Maintenance.

Clean windows are essential to proper utilization of natural light, and this simple rule of good housekeeping will go far toward solving the lighting problem in many plants. In plants having extensive window space but inadequate window-cleaning service, accumulated dust, grease, and grime on window panes may cut natural illumination to zero, so that it is necessary during practically all hours of the day to resort to artificial light. The cleaning of luminaires and of light bulbs themselves is equally important.

The fact that light is a factor which increases the efficiency and safety of every other tool is fully appreciated by progressive designers and owners of modern plants. It is not uncommon to build track systems for window washers' trucks upon roof and walls of factories so as to facilitate window and skylight working.

An example may be cited which shows the importance placed on clean windows by progressive industries in a steel plant in Pennsylvania. $50,000.00 was spent for construction of a window washer's railway system immediately under the glass roof of the plant * * *.

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* Published by the National Society for the Prevention of Blindness, Columbia University Press, 1941, p. 18-190.

The proper and adequate maintenance of equipment is essential for both natural and artificial lighting. The factory owner should establish a regular definite system of maintenance so as to insure that skylights, side windows * * * are at all times kept clean * * *.

APPENDIX III

PSYCHOLOGY FOR BUSINESS AND INDUSTRY[1]

By Herbert Moore, Ph.D.

The importance of proper lighting can best be shown by giving some facts that have been discovered regarding the effects of poor illumination on both efficiency and accident frequency.

A. Effects on Efficiency. The decrease in efficiency because of inadequate illumination is shown in a study made by the National Industrial Fatigue Research Board. [This study] gives the record of work under two conditions, which differ from one another only in the degree of illumination present. It will be noticed that not only was the output lower in the first hour of the morning when artificial illumination was used, but that it remained lower during every hour of the day, with the exception of one period.

* * * *

Studies made by the Departmental Committee on Lighting of factories and workshops in Great Britain report the percentage increases in accidents attributable to poor artificial lighting . . . The striking fact about these reports is that on docks and in shipyards and metal foundries there were twice as many accidents due to persons falling during artificial as during natural light.

A study made by Stephenson on the effects of artificial light, as compared with natural light, on accident rate showed an average increase of 36 per cent under artificial light. His results showed a significant increase in accident rate during the first hour of each day when artificial light

[1] McGraw-Hill Book Company, Inc., 1942, pages 344-351.

is used; that is succeeded by a period of adaptation with approximately daylight accident rate; and then follows a large increase in rate (140 per cent in his study), due to the more rapidly fatiguing eye condition under artificial light.

* * * * *

Percentage Loss in Reading Efficiency Under Different Systems of Illumination

System of illumination	Per cent loss after	
	Two hours	Three hours
Daylight	5	6
Indirect	10	9
Semi-indirect	34	72
Direct	37	81